EDITOR'S NOTE

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Supreme Court, U.S.
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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JANET BARBE,

Petitioner,

v.

THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC., ET AL.,

Respondents.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

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QUESTION PRESENTED

1. Whether garden variety common law torts of intentional infliction of emotional distress and defamation are preempted by §301 of the Labor Management Act, 29 U.S.C. §185, when the defendant seeks to use the collective bargaining agreement as a defense to the action.

PARTIES

Janet Barbe,

Petitioner,

versus

The Great Atlantic & Pacific Tea Co., Inc. and W. E. Zentgraf,

Respondents.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES iv
OPINIONS BELOW 2
JURISDICTION 2
STATUTES INVOLVED 2
STATEMENT OF THE CASE 3
ARGUMENT 8

I. The Courts are Split as to Whether Preemption of a State Law Claim Under §301 Should Turn On The Plaintiff's Reliance on the Collective Bargaining Agreement for the Cause of Action, as Opposed to the Defendant's Reliance on the Collective Bargaining Agreement as a Defense 9

CONCLUSION 20
APPENDIX A 1a
APPENDIX B 1b

TABLE OF AUTHORITIES

CASES:

Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987) 18
Douglas v. American Information Technologies, 877 F.2d 565 (7th Cir. 1989) 14
Fox v. Parker Hannifin Corp., 914 F.2d 795 (6th Cir. 1990) 9, 17
Franchise Tax Bd. v. Laborers Vacation Trust, 463 U.S. 1 (1982) 18
Gulden v. Crown Zellerbach Corp., 890 F.2d 195 (9th Cir. 1989) 9, 12
Hanks v. General Motors Corp., 859 F.2d 67 (8th Cir. 1988) 9, 12
Jackson v. Southern California Gas Co., 881 F.2d 638 (9th Cir. 1989) 9, 12
Johnson v. Anheuser Busch, Inc., 876 F.2d 620 (8th Cir. 1989) 9, 11
Keehr v. Consolidated Freightways of Delaware, Inc., 825 F.2d 133 (7th Cir. 1987) 13
Krashna v. Oliver Realty, Inc., 895 F.2d 111 (3rd Cir. 1990) 15
Lingle v. Norge Division, Magic Chef, 486 U.S. 399 (1988) 20
Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) 13
Local No. 57 v. Bechtel Power Corp., 834 F.2d 884 (10th Cir. 1987) 9, 18
McCormick v. AT&T, 934 F.2d 531 (4th Cir. 1991) 6, 9, 10
O'Shea v. Detroit News, 887 F.2d 683 (6th Cir. 1989) 9, 16

Pantoja v. Texas Gas and Transmission Corp., 890 F.2d 955 (7th Cir. 1989) 18
Smolarek v. Chrysler Corp., 879 F.2d 1326 (6th Cir. 1989) 9, 17
Tellez v. Pacific Gas & Electric. Co., 817 F.2d 536 (9th Cir. 1987) 9, 13
Wells v. General Motors Corp., 881 F.2d 166 (5th Cir. 1989) 9

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Petitioner Janet Barbe hereby petitions this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Fourth Circuit in *Barbe v. The Great Atlantic & Pacific Tea Co., Inc., et al.*, No. 89-1566, is reproduced in Appendix A. The unreported opinion of the United States District Court for the District of Maryland in *Barbe v. The Great Atlantic & Pacific Tea Co., Inc., et al.*, Civil No. PN-88-1316, is reproduced in Appendix B.

JURISDICTION

The Fourth Circuit of the United States Court of Appeals issued its decision and judgment on July 26, 1991. On October 16, 1991, the Chief Justice of the Supreme Court signed an order granting an extension of time within which to file a petition for writ of certiorari to and including November 23, 1991. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTES INVOLVED

§301(a) of the Labor Management Relations Act, 29 U.S.C. §185 provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having

jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

28 U.S.C. §1441 provides:

Except as otherwise expressly provided by Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending...

STATEMENT OF THE CASE

I. Statement of the Facts

Petitioner Janet Barbe (Barbe) began her employment for The Great Atlantic & Pacific Tea Company, Inc. (A&P) on September 24, 1984 as a bakery clerk. On or about April 7, 1987, W.E. Zentgraf (Zentgraf) was employed by A&P as the Director of Personnel of the Mid-Atlantic Group. Barbe was covered by a collective bargaining agreement which included representation by Local 27, United Food and Commercial Workers Union.

Barbe filed a Workmen's Compensation Claim against a previous employer, Dunkin Donuts, for an injury to her back. She appeared for a hearing regarding the

claim on March 30, 1987. Zentgraf knew the hearing involved Barbe's previous employer and not A&P.

On March 31, 1991, Barbe's employment was terminated by Zentgraf for allegedly falsifying A&P documents presumably regarding her workman's compensation claim. Zentgraf sent a letter on April 7, 1987, which provides: "This is to advise you that effective March 31, 1987 you are terminated for falsification of [a] company document." This letter was sent to Barbe at her home, to Barbe's two supervisors, and to the union who represented her under the Agreement.

When Barbe received the letter, other individuals were present and learned of the contents of the letter. Zentgraf also placed a copy of the letter in Barbe's employment file.

When advised by the union representative that Barbe was wrongly accused of falsifying company documents, A&P responded immediately, stating: "Please be advised that the letter date April 7, 1987, concerning your termination has been rescinded. Your file has been purged of any reference to the termination . . ."

Barbe's job was reinstated, but because of her back injury, she was given a six month leave of absence until October 7, 1987 by written notification from A&P on May 28, 1987. On October 8, 1987, She was given an extension to the leave of absence until April 8, 1988. On April 5, 1988, Barbe filed her claims against A&P and Zentgraf in the Circuit Court of the State of Maryland.

II. Previous Proceedings

A. District Court Proceedings

Barbe filed a complaint containing two counts, defamation and intentional infliction of emotional distress in the Circuit Court of Maryland against A&P and Zentgraf, for damages.

The defamation count alleged Zentgraf, as agent for A&P, intentionally and maliciously composed and published a false and defamatory letter stating Barbe falsified a company document. As a direct result of the publication of the defamatory letter, Barbe was held up to public ridicule, scorn, dishonor and embarrassment.

Barbe's intentional infliction of emotional distress claim alleged Zentgraf's wrongful termination of Barbe and the accusation that Barbe falsified company documents was intentional and reckless, extreme and outrageous, and the proximate cause of Barbe's severe emotional distress.

A&P removed the case to federal court and motioned for summary judgment alleging Barbe's claims were preempted by §301(a) of the Labor Management Relations Act (LMRA), 29 U.S.C. §185, and therefore barred by the statute of limitations of §301. Barbe motioned for remand to the state court, and opposed the motion for summary judgment. The district court refused to remand the case to state court and granted A&P's motion for summary judgment ruling Barbe's claims were

preempted by §301 and ruled her claim barred by the statute of limitations contained in §301.[1]

B. The United States Court of Appeals for the Fourth Circuit

1. The Majority Opinion: The Fourth Circuit affirmed the district court's ruling by an unpublished per curium opinion. The majority followed the analysis for determining §301 preemption in *McCormick v. AT&T,* 934 F.2d 531 (4th Cir. 1991) stating:

> We thus examine "whether resolution of the cause of action requires interpretation by a collective bargaining agreement." We note, however, that if "the state law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for §301 pre-emption purposes."[2]

Using the analysis of the district court, the majority ruled that whether A&P's conduct rose to the level of "extreme and outrageous" behavior depended on whether Barbe's conduct was in violation of the clause of the Agreement that provides "the employer has the right to discharge or to discipline any employee for good cause, including but not limited to, proven or acknowledge dishonesty..."[3] The majority concluded:

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[1] Appendix B.

[2] Appendix A, pages 3a-4a.

[3] Appendix A, Page 4a.

> We agree with the district court that the defamation claim cannot be resolved without first determining whether 'publication' occurred. However, whether the employer's notice to the union of an employee's termination constituted 'publication' requires an interpretation of the CBA.[4]

2. The Dissenting Opinion: Judge Sprouse, dissenting from the majority opinion, stated:

> State law actions are preempted by §301 only if a collective bargaining agreement is meaningfully involved. Here, at most, the interpretation of the labor contract between A&P and United Food Workers Local 27 could be only peripherally related to defenses to the state law claims.[5]

Judge Sprouse declared: "A&P has the same duty as every citizen of Maryland not to defame another and not to intentionally inflict emotional distress on another. Barbe makes no claim these duties were incurred or the breaches occasioned by any provision of the collective bargaining agreement."[6]

The dissent noted "the importance of core preemption principles-the promotion of collective bargaining processes and uniformity in interpreting

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[4] Appendix A, Pages 4a-5a.

[5] Appendix A, Page 5a.

[6] Appendix A, page 6a.

agreements resulting from them. However, in my view, overextended preemption rulings intrude into the domain of state law courts and invade the retained prerogatives of states to regulate individual conduct."[7] Preemption should ". . . follow only when a dispute is meaningfully dependent upon interpretations of collective bargaining agreements."[8]

ARGUMENT

"Federal preemption of state labor law has been one of the most confused areas of federal court litigation."[9] The confusion is generated because the courts cannot decide whether preemption under §301 should be based on the plaintiff's reliance on the collective bargaining agreement for its state law claim, or the defendant's reliance on the collective bargaining agreement for its defense.

The Fourth, Eighth and Ninth Circuits hold a defendant can defeat a state cause of action by declaring it intends to rely upon a collective bargaining agreement

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[7] Appendix A, Page 9a.

[8] Appendix A, Page 9a.

[9] Note, *The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 Yale L.J. 209 (1989). *Galvez v. Kuhn*, 933 F.2d 773 (9th Cir. 1991).

for its defense.[10] The Third, Sixth and Tenth Circuit have ruled a state law cause of action is not preempted only because the defendant chooses to use the collective bargaining agreement as a defense.[11]

The confusion of §301 preemption cases has led to conflicts between the federal courts and therefore it is crucial this Court end the confusion and issue a clear mandate in §301 preemption cases.

I. The Courts are Split as to Whether Preemption of a State Law Claim Under §301 Should Turn On The Plaintiff's Reliance on the Collective Bargaining Agreement for the Cause of Action, as Opposed to the Defendant's Reliance on the Collective Bargaining Agreement as a Defense.

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[10] *McCormick v. AT&T*, 934 F.2d 531 (4th Cir. 1991); *Johnson v. Anheuser Busch, Inc.*, 876 F.2d 620 (8th Cir. 1989); *Hanks v. General Motors Corp.*, 859 F.2d 67 (8th Cir. 1988); *Jackson v. Southern California Gas Co.*, 881 F.2d 638 (9th Cir. 1989); *Gulden v. Crown Zellerbach Corp.*, 890 F.2d 195 (9th Cir. 1989); *Tellez v. Pacific Gas & Electric. Co.*, 817 F.2d 536, 539 (9th Cir. 1987).

[11] *Krashna v. Oliver Realty, Inc.*, 895 F.2d 111 (3rd Cir. 1990); *Wells v. General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989); *O'Shea v. Detroit News*, 887 F.2d 683, 687 (6th Cir. 1989); *Smolarek v. Chrysler Corp.*, 879 F.2d 1326, 1334 (6th Cir. 1989); *Fox v. Parker Hannifin Corp.*, 914 F.2d 795, 800 (6th Cir. 1990); *Local No. 57 v. Bechtel Power Corp.*, 834 F.2d 884, 889 (10th Cir. 1987).

A. Federal Circuit Court Decisions

The First, Fourth, Eighth and Ninth Circuits have held that by raising the collective bargaining agreement as a defense, the state law claim is automatically preempted by §301 without consideration of the merits of the defense. However, these rulings depend on the court's analysis of the state law claims and in some situations the courts have not ruled the state law claims automatically preempted.

The Fourth Circuit considered *McCormick v. AT&T Technologies Inc., supra,* which involved a state law intentional infliction of emotional distress claim, among other claims, by an employee covered under a collective bargaining agreement. The employee, McCormick, was terminated by AT&T because of an unexplained absence. AT&T then removed and disposed of the personal property in McCormick's locker. McCormick's personal property included a personal letter containing very sensitive information about McCormick. Other AT&T employees were able to learn the contents of the personal letter because of AT&T's method of disposing McCormick's personal property. After a meeting with AT&T and a union representative, McCormick was reinstated but walked off the job when other AT&T employees made references to the contents of McCormick's personal letter. AT&T terminated McCormick's employment on the basis of job abandonment.

The court ruled: "the question in preemption analysis is not whether the source of a cause of action is

state law, but whether resolution of the cause of action requires interpretation of a collective bargaining agreement." *Id.* at 535. Applying the question of whether the resolution of McCormick's claim requires interpretation of the collective bargaining agreement the court held: "If the management's actions in disposing of the contents of McCormick's locker were authorized under the collective bargaining agreement, those actions could not simultaneously be consider 'outrageous and intolerable' under Virginia law." *Id.* at 537.

The Eighth Circuit, in *Johnson v. Anheuser Busch, Inc.*, 876 F.2d 620 (8th Cir. 1989) addressed the issue of whether state law claims for slander, libel and intentional infliction of emotional distress, among other claims, were preemption by §301. The case involved an investigation of a report filed by a co-employee who alleged his tires were slashed. Johnson was arrested following the investigation. Although the charges were later dismissed, Anheuser Busch terminated Johnson as a result of the incident.

The court ruled the alleged libelous statements involve the ongoing employment relationship and as such relate to a dispute over an event occurring at the work place and is governed by the collective bargaining agreement. The intentional infliction of emotional distress arises out of Anheuser's conduct regarding the discharge of Johnson therefore the collective bargaining agreement is necessary to determine if the conduct was warranted. The court held Johnson's claims preempted by §301.

However, *Hanks v. General Motors Corp.*, 859 F.2d 67 (8th Cir. 1988) held §301 does not preempt a state law intentional infliction of emotional distress claim where General Motors assigned an employee covered by a collective bargaining agreement to work under a foreman whom General Motors knew had sexually assaulted the employee's daughter. The court remanded the claim to the district court to determine whether resolution of the state law claim would require a construction of the collective bargaining agreement stating: "The factual background of the entire case must be examined against an analysis of the state tort claim and a determination made whether the provisions of the collective bargaining agreement come into play." 859 F.2d at 70.

In *Jackson v. Southern California Gas Co.*, 881 F.2d 638 (9th Cir. 1989), Jackson alleged he was defamed by statements made by several Southern California Gas Employees accusing him of embezzlement, sexual harassment and poor work performance. The court ruled the claim did not assert rights gained from the collective bargaining agreement, and does not require interpretation of the agreement's terms because "the accusations do not appear to have been made pursuant to any requirements of the disciplinary procedures." 881 F.2d at 645. However, the court ruled Jackson's intentional infliction of emotional distress claim was preempted because "the collective bargaining agreement here contains detailed provisions governing the types of activities alleged by Jackson in support of his intentional and negligent infliction of emotional distress claims." *Id.* at 646. *See also Gulden v. Crown Zellerbach Corp.*, 890 F.2d 195 (9th Cir. 1989) (holding state law fraud claim is not preempted

when neither based on or dependant upon an interpretation of the collective bargaining agreement).

However, *Tellez v. Pacific Gas & Electric. Co.*, 817 F.2d 536, 539 (9th Cir. 1987) ruled the claims of intentional infliction of emotional distress was not preempted because the "collective bargaining agreement does not envision such [outrageous] behavior" by its employer and "its grievance mechanism is not equipped to redress it."

The Seventh Circuit has ruled disparately on §301 preemption, depending on the standard by which it scrutinizes the claims. For example, in *Keehr v. Consolidated Freightways of Delaware, Inc.*, 825 F.2d 133 (7th Cir. 1987), involved an employee, Bruce, covered by a collective bargaining agreement who brought a state law defamation and intentional infliction of emotional distress action against his employer for remarks made by his supervisor. Bruce alleged the employer was harassing him and other employees in order to force the employees to leave or be discharged. The court stated:

> To preclude preemption, a claim for intentional infliction of emotional distress must be either unrelated to employment discrimination or a function of the particular abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself. 825 F.2d at 136.

The court relied on *Linn v. United Plant Guard Workers,* 383 U.S. 53, 65 (1966), when it considered the

defamation claim, and concluded that defamation is not preempted by §301 if plaintiff "can show that the defamatory statements were circulated with malice and caused him damage", requiring that malice be shown to minimize the possibility that labor debate will be chilled by the threat of state libel suits.

The court ruled the employer "has not suggested that Bruce's claims are in any way derived from rights or duties provided for under the contract. Because the resolution of Bruce's tort claims in no way depends on an interpretation of the labor contract. we conclude that Bruce's claims are not preempted by section 301." 825 F.2d at 137.

In contrast, the Seventh Circuit ruled on an employee's state law claim for intentional infliction of emotional distress and stated: "The fact that a particular provision of the collective bargaining agreement may not explicitly address the conduct underlying Ms. Douglas' complaint does not mean that resolution of an intentional infliction of emotional distress claim does not require interpretation of the agreement." *Douglas v. American Information Technologies,* 877 F.2d 565, 572 (7th Cir. 1989). The court ruled the employee's claim was preempted by §301 because: "A court will be required to determine whether her employer's conduct was authorized by the explicit or implicit terms of the agreement." 877 F.2d at 573.

The Fifth, Sixth and Tenth Circuits have ruled that §301 preemption depends upon the plaintiff's reliance on the collective bargaining agreement and not necessarily on

the defendant's reliance on the collective bargaining agreement as a defense.

In *Krashna v. Oliver Realty, Inc.,* 895 F.2d 111 (3rd Cir. 1990), an employee, Krashna, covered under a collective bargaining agreement allegedly suffered carbon monoxide poisoning while on the job and filed for worker's compensation. The following day Krashna was terminated from his employment. The employee filed a state law action alleging intentional infliction of emotional distress, wrongful discharge, and tortious interference with contract. The court noted: "removal is proper if §301 completely preempts Krashna's stat law claims." 895 F.2d at 114. Therefore, the court concluded: "Krashna's claims of intentional infliction of emotional distress, and tortious interference with contract are clearly outside the scope of the collective bargaining agreements and §301 of the LMRA." *Id.* at 114.

Wells v. General Motors Corp., 881 F.2d 166 (5th Cir. 1989), involved a claim regarding the fraudulent misrepresentation of a rehiring procedure where General Motors offered employees, covered under a collective bargaining agreement, an option of a severance payment in lieu of preserving their seniority and rehire rights. Under the option, the employees could be rehired if new jobs were created. When new jobs were created, the employees who had opted for the severance payment were told they were not eligible to be rehired. The court ruled the claim was not preempted by §301 because "it is not the case that section 301 preemption occurs whenever a collectively-bargained agreement become relevant to a dispute of this nature; rather the resolution of the

particular dispute must be *substantially* dependant upon analysis of the terms of the collective bargaining agreement." 881 F.2d at 173. The court stated:

> Therefore, we hold that where, as here, the employee/plaintiffs' state law claims are founded upon contractual rights or common-law rights independent of those which the collectively-bargained agreement creates, a defense that relies upon the provisions of a collectively-bargained agreement does not invoke federal preemption unless that agreement contains provision that govern, or reasonable might be construed as governing, the circumstances at hand. Contrary to GM's assertions here, a court's perusal of the agreement to determine whether such provision are contain within it does not constitute "interpretation' of that agreement." *Id.* at 174.

The Sixth Circuit has ruled "it is irrelevant to the preemption question whether or not the employer can defend by showing it had the rights under the collective bargaining agreement to do what it did." *O'Shea v. Detroit News,* 887 F.2d 683, 687 (6th Cir. 1989). An elderly employee covered by a collective bargaining agreement to a night shift, even though the employer knew the employee had health problems. The employer allegedly was trying to force the employee to retire. When the employee suffered a heart attack and died, employee's wife brought state law claims against the employer, News, including a claim for intentional infliction of emotional distress.

The court stated strongly: "The point is that Michigan employees have the right not to be discriminated against on the basis of age or handicap without regard to the collective bargaining agreement's language on employee's rights." 887 F.2d at 687.

On the issue of the emotional distress claim, the court concluded: "The News could have tortiously caused O'Shea emotional distress without violating the contract", and therefore ruled the cause of action was not preempted by §301. 887 F.2d at 687.

In *Smolarek v. Chrysler Corp.*, 879 F.2d 1326, 1334 (6th Cir. 1989) (en banc) cert. denied 110 S.Ct 539, an employee covered under a collective bargaining agreement brought a state law handicap discrimination claim against the employer, alleging the employer failed to accommodate his handicap as required by state law. The court ruled the question of whether the employee was discriminated against because of his handicap was separate from any possible defense the employer might have under the contract. "It is irrelevant to the preemption question whether or not the employer can defend by showing it had the right under the collective bargaining agreement to do what it did." 879 F.2d at 1334. *See also Fox v. Parker Hannifin Corp.*, 914 F.2d 795, 800 (6th Cir. 1990) (a defendant's reliance on a collective bargaining agreement term purely as a defense does not result in section 301 preemption).

In a retaliatory discharge claim, the Seventh Circuit ruled: "Thus after *Lingle,* no state-based cause of action is preempted by section 301 of the LMRA merely because

a state court might focus upon the same facts which would be considered when resolving a dispute under a collective-bargaining agreement." *Pantoja v. Texas Gas and Transmission Corp.*, 890 F.2d 955, 959 (7th Cir. 1989). The court need not determine whether the motive for the discharge was a legitimate one, "it must simply determine whether such a motive exists - not whether, as a matter of law, the collective bargaining agreement justifies such a motive." *Id.* at 959.

The Tenth Circuit held even if a state court " . . . would find the collective bargaining agreement relevant to show waiver or consent as a state law defense to plaintiff's allegations," there would still be no complete §301 preemption of a state law claim, and no federal court jurisdiction over such a claim. *Local No. 57 v. Bechtel Power Corp.*, 834 F.2d 884, 889 (10th Cir. 1987).

B. Supreme Court Decisions

The premise of §301 preemption is stated in *Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1, 23 (1982), "the pre-emptive force of §301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.'"

This Court clarified §301 preemption in *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987), addressing the issue of whether "§301 preempts a state law claim even when the employer raises only a defense that requires a court to interpret or apply a collective bargaining agreement" and stating: "a plaintiff covered by a collective-bargaining

agreement is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied upon is *not* a collective-bargaining agreement." 482 U.S. at 396. *Caterpillar* declared:

> It is true that when a defense to a state claim is based on the terms of a collective bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives, But the present of a federal question, even a §301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule - that the plaintiff is the master of the complaint, that federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court. When a plaintiff invokes a right created by a collective bargaining agreement, the plaintiff has chosen to plead what we have held must be regarded as a federal claim, and removal is at the defendant's option. But a defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state law claim, transform the action into one arising under federal law. 482 at 398-99.

Caterpillar concluded: "The fact that a defendant might ultimately prove that a plaintiff's claims are pre-empted under the NLRA does not establish that they are removable to federal court." 482 at 398.

In *Lingle v. Norge Division, Magic Chef,* 486 U.S. 399 (1988), this Court noted: "Thus, as a general proposition, a state law claim may depend for its resolution upon both the interpretation of a collective-bargaining agreement and a separate state law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state law analysis would not be thereby pre-empted." 486 U.S. at 413 n.12. *Lingle* involved an employee covered under a collective bargaining agreement who had been injured in her course of employment and requested worker's compensation. The employee was then discharged for filing an allegedly false worker's compensation claim. On behalf of the employee, the union filed a grievance but while arbitration on the grievance was proceeding, the employee filed at state law claim alleging wrongful discharge. The Court ruled the employee's state law claim was not preempted by §301: "even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for §301 preemption purposes," 486 at 409.

CONCLUSION

Barbe was wrongfully accused of falsifying company documents and within the limitations imposed by Maryland law, Barbe filed suit. Barbe's cause of action stated A&P and Zentgraf had a duty under Maryland law

not to defame her or intentionally inflict severe emotional distress by publishing wrongful accusations.

A&P and Zentgraf argue they acted in good faith under the Agreement when they sent defamatory letters to Barbe, her supervisors and the union. They based their contentions on the collective bargaining agreement which states the purpose of the agreement is to provide a channel through which information and problems may be transmitted from one to the other.

A&P and Zentgraf concede the agreement contains no specific provision requiring notice to Local 27 of employee discipline or termination. However, they argue the agreement establishes mandatory arbitration for resolution of any dispute concerning the interpretation of the provisions of the collective bargaining agreement. The agreement also provides that within three days of notice from either the employer, employee or union representatives, the parties will attempt to reach settlement. This provision, argues A&P and Zentgraf, supports their contention that the sending of the defamatory letter was in compliance with the notice requirement of the agreement. A&P and Zentgraf conclude if the sending of the defamatory letter was in compliance with the Agreement, then the sending was not a publishing, the letter itself was a privileged communication and their acts in compliance cannot be extreme or outrageous. Therefore, A&P and Zentgraf argue, their defense requires an interpretation of the Agreement and Barbe's cause of action is preempted by §301.

This approach to §301 preemption does not take into consideration whether the defense used is without merit. Even if A&P and Zentgraf were complying with a notice requirement in sending the defamatory letter, the question of whether these actions were extreme and outrageous still remains. The agreement does not excuse extreme and outrageous behavior.

With regard to the defamation action, even if A&P and Zentgraf were complying with an implied notice requirement in sending the defamatory letter, the Agreement does not give A&P and Zentgraf the right to intentionally defame Barbe.

If Barbe's state law claims were decided by the 3rd, Sixth or Tenth Circuits and conceivably, the Seventh and Ninth Circuits, her state law claim would not be preempted because the claim was not based on the collective bargaining agreement and resolution of the claim would not require interpretation of the collective bargaining agreement. Under *Caterpillar* and *Lingle*, Barbe's intentional infliction of emotional distress state law claim would also be allowed to continue. However, under the Fourth and Eighth, and sometime Ninth Circuits, Barbe's state law claims would be preempted because A&P and Zentgraf have used the collective bargaining agreement as a defense, therefore preemption would be automatic and not depend on whether the defense had merit.

The LMRA does not deprive an employee covered under a collective bargaining agreement of all state law rights of action. However, because of the confusion in the

Circuit Courts, employees covered under a collective bargaining agreement are being deprived of their state law rights depending upon which Circuit has jurisdiction.

Respectfully submitted,

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APPENDIX A
UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JANET BARBE,
Plaintiff-Appellant,

v.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INCORPORATED; W. E. ZENTGRAF,
Defendants-Appellees.

No. 89-1566

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Paul V. Niemeyer, District Judge.
(CA-88-1316-PN)

Argued: April 5, 1990

Decided: July 26, 1991

Before MURNAGHAN and SPROUSE, Circuit Judges, and SMITH, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion. Judge Sprouse wrote a dissenting opinion.

COUNSEL

ARGUED: Michael Lewis Freilich, MICHAEL LEWIS FREILICH, CHARTERED, Towson, Maryland, for Appellant. Peter Francis Healey, REED, SMITH, SHAW & MCCLAY, Washington, D.C., for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

The case presents the issue of whether an employee's defamation and intentional infliction of emotional distress claims against an employer are preempted by § 301 of the Labor Management Relations Act ("LMRA"). Janet Barbe, the employee, was covered by a collective bargaining agreement. She sued her employer, the Great Atlantic and Pacific Tea Company, Inc., ("A & P") for defamation and intentional infliction of emotional distress after she received a letter from it stating that she was terminated for falsifying a company document. The district court granted summary judgment against Barbe's claims, reasoning that her claims were preempted by § 301 of the LMRA. Barbe could not make out a § 301 claim because she failed to exhaust her administrative remedies and failed to make a timely claim. Barbe has appealed, arguing that her common law claims are not preempted by § 301.

I.

Barbe was a bakery clerk for A & P beginning in 1984. On April 7, 1987, personnel director W.E. Zentgraf sent her the following letter in the belief that Barbe falsified a workers' compensation claim:

> This is to advise you that effective March 3, 1987, you are terminated for falsification of [a] company document.

Zentgraf forwarded copies of the letter to Barbe's two supervisors as well as to the union that represented her, Local 27 of the United Food & Commercial Workers Union.

The Union had a collective bargaining agreement ("CBA") with A & P. Article IV, Section 8 of the CBA provided:

> The Employer has the right to discharge or discipline any employee for good cause, including but not limited to, proven or acknowledged dishonesty, intoxication during working hours, provided however, that no employee shall be discharged or discriminated against because of membership in the Union or for Union activities.

Article 10 of the CBA provided for a mandatory arbitration and adjustment mechanism in the event of a dispute "concerning the interpretation of the provisions of th[e] Agreement."

When the Union received the copy of the termination letter that Zentgraf sent to Barbe, it acted on Barbe's behalf. A & P agreed to rescind the letter, to purge Barbe's files, and to offer her the choice of either resigning or taking a medical leave of absence rather than termination. Barbe took a six-month leave of absence, which was later extended, and sought no further administrative relief.

But Barbe did institute a suit against A & P in Maryland state court, alleging defamation and intentional infliction of emotional distress. The suit was removed to the United States District Court for the District of Maryland. The district court, Judge Paul V. Niemeyer presiding, denied Barbe's motion to remand the case to state court, holding that Barbe's state tort claims were preempted by § 301 of the LMRA. He then granted the defendants' motion for summary judgment because, as her claim was a § 301 claim, Barbe had failed to exhaust her administrative remedies and had failed to file suit within the requisite six-month period. *Barbe v. Great Atlantic & Pacific Tea Co.*, 722 F. Supp. 1257, 1263 (D. Md. 1989). Barbe has argued on appeal that her state tort claims are not preempted by § 301 of the LMRA, urging that her claims be remanded to state court.

II.

The analysis for determining § 301 preemption has been recently articulated in *McCormick v. AT&T*, _ F.2d _, No. 88-3542 (4th Cir., May 28, 1991) (*en banc*). Although two of us joined the dissent to the *en banc* opinion in *McCormick*, we are now bound to follow *McCormick* as this circuit's law. We thus examine "whether resolution of the cause of action requires interpretation by a collective bar-

gaining agreement." Slip op. at 6. We note, however, that if "the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes." *Id.* at 7 (*quoting Lingle v. Norge Div'n of Magic Chef, Inc.*, 486 U.S. 399, 409-10 (1988)).

In Maryland, to establish a *prima facie* case of defamation, a plaintiff must establish that (1) the defendants published a false and defamatory statement, (2) by acting with knowledge or reckless disregard as to its falsity, or by negligently failing to ascertain the truth of the defamatory statement, (3) which has caused damage to the plaintiff. *See Metromedia, Inc. v. Hillman*, 285 Md. 161, 171-72, 400 A.2d 1117, 1123 (1979). The district judge concluded that Barbe's defamation claim was preempted by § 301. 722 F. Supp. at 1262. First, he reasoned, whether or not sending notice of Barbe's termination to the union was "publication" would depend upon whether the CBA authorized, or perhaps even anticipated, the sending of such a notice. *Id.* at 1261. Thus, interpretation of the CBA would be required. Second, he reasoned that the state court would have to interpret the agreement in order to determine whether the communication from the employer to the union was privileged. *Id.* at 1261-62.

Under Maryland law, in order to establish a claim for intentional infliction of emotional distress, a plaintiff must show that the defendant's conduct (1) was intentional or reckless, (2) was extreme and outrageous, and (3) caused severe emotional distress. *See Harris v. Jones*, 281 Md. 560, 566, 380 A.2d 611, 614 (1977). The district judge concluded that the determination of whether the conduct was outrageous or extreme would depend on whether Barbe's conduct was in violation of the agreement that provided the basis for the termination. *Id.* at 1262. If A & P complied with the agreement, he reasoned, "Barbe would be hard pressed to urge that the conduct was outrageous." *Id.* Furthermore, he reasoned, because tortious conduct may be privileged if the tortfeasor is merely insisting on his legal rights, the agreement would have to be interpreted to consider the question of privilege. *Id.*

We agree with the district court that the defamation claim cannot be resolved without first determining whether "publication" occurred. However, whether the employer's notice to the union of an employ-

ee's termination constituted "publication" requires an interpretation of the CBA. The district judge's analysis of the claim for intentional infliction of emotional distress parallels the *McCormick* opinion's analysis of a state claim for intentional infliction of emotional distress with respect to outrageous conduct. *See* slip op. at 11-12. Both claims, therefore, are preempted.

Accordingly, the district court's judgment is

AFFIRMED.

SPROUSE, Circuit Judge, dissenting:

I respectfully dissent. The recognition of the *Lingle* principles by my brethren in the majority is, of course, correct as far as it goes, but I dissent because I think the principles have been misapplied. In my view, state law actions are preempted by § 301 only if a collective bargaining agreement is meaningfully involved.[1] Here, at most, the interpretation of the labor contract between A & P and United Food Workers Local 27 could be only peripherally related to defenses to the state law claims.

The actions here which the majority holds to be preempted by § 301 are unadorned "garden variety" state tort actions—defamation and intentional infliction of emotional distress. The facts of the case, of course, have not been developed in detail, but it is apparent that A & P wrongly accused Ms. Barbe of falsifying a workers' compensa-

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[1]The Supreme Court cases finding § 301 preemption were concerned with central involvement of a collective bargaining agreement. For example, the Supreme Court explained its analysis in *Allis-Chalmers* as follows:

> We began by examining the collective-bargaining agreement, and determined that it provided the basis not only for the benefits, but also for the right to have payments made in a timely manner. We then analyzed the Wisconsin tort remedy, explaining that it "exists for a breach of a 'duty devolv[ed] upon the insurer by reasonable implication from the express terms of the contract,' the scope of which, crucially, is 'ascertained from a consideration of the contract itself.' "

Lingle, 486 U.S. at 405 (citations omitted).

tion claim.[2] Neither of Barbe's state law claims alleged that A & P violated any duty directly or indirectly arising from the collective bargaining agreement. To the contrary, her claims are asserted under general provisions of Maryland law. A & P has the same duty as every citizen of Maryland not to defame another and not to intentionally inflict emotional distress on another. Barbe makes no claim that these duties were incurred or the breaches occasioned by any provision of the collective bargaining agreement.

I.

Concerning the claim of intentional infliction of emotional distress, the majority holds that whether A & P's conduct rose to the level of "extreme and outrageous" behavior depends on whether Barbe's conduct was in violation of the clause of the collective bargaining agreement that provides "the employer has the right to discharge or to discipline any employee for good cause, including but not limited to, proven or acknowledged dishonesty. . . ." The majority adopted the district court's reasoning that a discharge justified under this contractual provision could not be extreme and outrageous; that A & P's defense, therefore, was dependent on a demonstration that it complied with the contract; and, therefore, an interpretation of the collective bargaining agreement was necessary to the resolution of the state law claim. In my view, the insistence that such a defense depends on an interpretation of that provision is essentially premised on a "good cause" argument, *i.e.*, that a showing of "good cause" under the agreement would be a defense to the emotional distress complaint.

This exact analysis was rejected in *Lingle*. There, referring to the

[2]The letter A & P sent to her and to the recipients who received copies stated: "This is to advise you that effective March 31, 1987, you are terminated for falsification of [a] company document." The union representative wrote his company counterpart, stating: "The above named employee has informed me that she was terminated on April 7, 1987. We disagree with the termination and we are requesting a meeting at your earliest convenience. . . ." The company responded one day later, stating: "Please be advised that the letter dated April 7, 1987, concerning your termination has been rescinded. Your file has been purged of any reference to the termination. . . ."

Seventh Circuit's erroneous analysis that "the just cause provision in the collective bargaining agreement may well prohibit such retaliatory discharge," the Court announced the now familiar rule that "if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes." *Id.* at 409-10.

Lingle involved an alleged retaliatory discharge. In *Lingle*, the Court described the issue before it as follows: "The question presented in this case is whether an employee covered by a collective-bargaining agreement that provides her with a contractual remedy for discharge without just cause may enforce her state-law remedy for retaliatory discharge." *Id.* at 401. The defendant in *Lingle* could have stated its principal argument in the same way that A & P does here—that if a discharge was for "just cause," it could not have been retaliatory and, therefore, the resolution of the *Lingle* state law claim of retaliatory discharge depended upon the meaning of the collective bargaining agreement. The Court, however, found that to reach the issue of retaliatory discharge, it need not interpret the contractual meaning of "just cause," because "just cause" might have a different meaning under the state law of retaliatory discharge. *Id.* at 407. Importantly, the Court explained that:

> The mere fact that a broad contractual protection against discriminatory—or retaliatory—discharge may provide a remedy for conduct that coincidentally violates state law does not make the existence or the contours of the state-law violation dependent upon the terms of the private contract. For even if an arbitrator should conclude that the contract does not prohibit a particular . . . retaliatory discharge, that conclusion might or might not be consistent with a proper interpretation of state law.

Id. at 412-13.

That reasoning applies with equal force to the instant case. Further, even if an arbitrator concluded that the contract included an implied notice requirement or that the contract permitted such investigations

into employee misconduct, it would not resolve the state-law inquiry of whether A & P's actions were extreme and outrageous under Maryland law. As the *Lingle* Court ruled, the existence of a private contractual remedy against the employer's wrongful conduct "does not make the existence . . . of the state-law violation dependent upon the terms of the private contract." *Id.* at 413.

II

Whether the defamation action is preempted presents a closer question, but on balance, I think it is not. A & P asserts that the agreement could be interpreted to require notice to the union of Barbe's discharge, thus, implicating the defense of privilege for the publication. In the first place, the contract has no explicit notice provisions for employee discipline, discharge or otherwise. A & P asserts, however, that such notice has been customary between the parties to the agreement and that its inclusion in the contract could be inferred. Regardless of that, and regardless of whether such inclusion would, under Maryland law, be considered sufficient grounds for establishing privilege, I think the implication of the collective bargaining agreement in this manner is too attenuated. This kind of "interpretation defense" obviously could be raised against any action by an employee against her employer if the employment relationship is covered by a collective bargaining agreement. However, as the Court noted in *Lingle*, " 'not every dispute . . . tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301.' " *Id.* at 413 n.12 (quoting *Allis-Chalmers*, 471 U.S. at 271.) I agree that we must be cognizant of the purposes underlying the doctrine of preemption. But that presents no problem in the instant dispute. The Supreme Court could not have described those purposes more clearly than it did in *Lingle*. It emphasized that

> the subject matter of § 301(a) "is peculiarly one that calls for uniform law." . . . The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by

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> the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation. Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.

Lingle, 486 U.S. at 404 n.3.

I have quoted this language in some detail because I think it is important to focus on the purposes of the § 301 preemption doctrine in deciding whether A & P's defenses would implicate those concerns. I submit that they would not. Consideration by a state court of such peripheral effects of a collective bargaining agreement could not "exert disruptive influence" upon negotiations in administration of collective agreements nor impede the parties' willingness to agree to arbitration provisions. In my view, the sweep of the Supreme Court's opinion included these kinds of circumstances when it stated that "'not every dispute . . . tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301.'" *Lingle*, 486 U.S. at 413 n.12 (citation omitted). The Court simply recognized again the critical constraint imposed by concern for comity and federalism in this sensitive area of federal/state law.

I, of course, recognize the importance of core preemption principles—the promotion of collective bargaining processes and uniformity in interpreting agreements resulting from them. However, in my view, overextended preemption rulings intrude into the domain of state law courts and invade the retained prerogatives of states to regulate individual conduct. Proper adherence to *Lingle* would avoid these dangers while concomitantly preserving the principles of preemption, for it would require that preemption follow only when a dispute is meaningfully dependent upon interpretations of collective bargaining agreements.

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The majority opinion correctly notes that we are, of course, bound by our *en banc* opinion in *McCormick*. While the proposed majority and dissenting opinions in the case *sub judice* were retained pending the opinion in *McCormick*, the result in that fact-specific case does not require an alteration of my views expressed in this dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JANET BARBE	*	
v.	*	CIVIL NO. PN-88-1316
THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC. and W. E. ZENTGRAF	*	

Filed: September 27, 1991.

Michael Lewis Freilich, Esq., Towson, Maryland: for plaintiff.

Peter F. Healey, Esq., R. Stephen Carroll, Esq., and Reed Smith Shaw & McClay, Washington, D.C.; for defendants.

Niemeyer, United States District Judge.

OPINION AND ORDER

This case presents the question whether an employee's state common law actions of defamation and intentional infliction of emotional distress against her employer are preempted by §301 of the Labor Management

Relations Act when the employment relationship is governed by a collective-bargaining agreement.

I

Janet Barbe, plaintiff, began employment with the defendant, A&P, in 1984 as a bakery clerk. In the spring of 1987, A&P sent Barbe a letter, on the belief that she falsified a worker's compensation claim, that stated, "This is to advise you that effective March 31, 1987, you are terminated for falsification of company document." The letter, which was dated April 7, 1987, was sent by A&P's personnel director Zentgraf to Barbe, to Barbe's two supervisors, and to the local union that represented her for collective-bargaining, United Food and Commercial Workers Union Local 27. A&P contends that it was justified in the termination of Barbe because her conduct amounted to "dishonesty" as that term is used in the collective- bargaining agreement between A&P and Local 27. The agreement provides, "the employer has the right to discharge or to discipline any employee for good cause, including but not limited to, proven or acknowledged dishonesty."

Barbe agrees that the letter was properly sent to her supervisors and that communication of an allegedly defamatory statement was privileged. *See Stevenson Baltimore Baseball Club, Inc,* 250 Md. 482 (1968). She contends, however, that by sending the letter to the union, A&P published a libelous statement giving rise to her claim for defamation. Barbe concedes that it was the usual practice for the employer to notify the union of employee discipline and agrees that the union would be justifiably

upset if it did not receive such notice. She contends, however, that receipt of the letter by the union was not mandated by the collective-bargaining agreement. She argues therefore that whether a claim for defamation has been shown may be determined independently of any interpretation of the collective-bargaining agreement.

Barbe also claims that the sending of the letter gives rise to damages for intentional infliction of emotional distress. She alleges in her complaint that the sending of the letter was "intentional and reckless"i that it was "extreme and Outrageous" in light of Barbe's "sensitive nature" and that it was "the proximate cause of the emotional distress." Again, she contends that this conduct is provable independently of any interpretation of the collective-bargaining agreement.

Following receipt of the termination letter, the union, acting on behalf of Barbe, adjusted the claim and #'on for her rescission of the letter and obtained for her the option to resign or be given a leave of absence if she were able to present a doctor's statement. Thereafter, Barbe elected to take a six-month leave of absence, which was later extended another six months. She pursued no other remedy and did not pursue the arbitral process that is granted to her under the collective-bargaining agreement. Rather, she elected to file this lawsuit for defamation and intentional infliction of emotional distress.

This action was originally filed in the Circuit Court for Baltimore County. The defendants removed the action to this court, arguing that plaintiff's claims were preempted

by §301(a) of the Labor Management Relations (Taft-Hartley) Act, 29 U.S.C.

Plaintiff, arguing that her claims are not preempted by federal law, has filed a motion to remand the action to state court. Defendants, on the other hand, relying on the fact that plaintiff's claims were properly removed to this court, have filed a motion to dismiss or for summary judgment, based on (1) plaintiff's failure to exhaust her contractual remedies and (2) the running of the applicable statute of limitations for a claim under §301. Barbe offered no defense on the merits of A&P's motion to dismiss. All parties agree that the controlling issue is whether Barbe's claims are preempted by §301 Of the Labor management Relations Act.

II

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

This section not only provides federal jurisdiction over controversies involving collective-bargaining agreements, but also "authorizes federal courts to fashion

a body of federal law for the enforcement of these collective-bargaining agreements." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 451 (1957). The Supreme Court analyzed §301's preemptive effect in *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962), where the Court stated:

> The dimensions of §301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute [so that]. . . issues raised in suits of a kind covered by §301 [are] to be decided according to the precepts of federal labor policy.

Id. at 103.

An example of the application of this principle of §301 preemption is found in 471 U.S. 202 (1985). There, the Court considered whether the Wisconsin state common law cause of action for bad-faith handling of an insurance claim could be applied to the handling of a claim for disability benefits that were authorized by a collective-bargaining agreement. The Court concluded that §301 preempted the state law cause of action because resolution of the state law claim depended upon an interpretation of the collective-bargaining agreement, an interpretation which, to ensure uniformity, should be made using federal labor law principles. The Court directed the focus of any preemption analysis to the issue "whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract." Id. at 213.

Following the decision in *Allis-Chalmers*, when applying the standard whether the state tort is "inextricably

intertwined" with collective-bargaining agreements, courts have tended from time to time to inquire whether the state court would be "deciding precisely the same issue as would an arbitrator" under the collective-bargaining agreement or whether the decisions by a state court and an arbitrator would "implicate the same analysis of the facts." *see e.g. Lingle v. Norge Div. of Magic Chef, Inc.*, 823 F.2d 1031, 1046 (7th Cir. 1987), rev'd 486 U.S. 399 (1988). While a preemption analysis may well focus attention on the same facts to resolve state claims and arbitration claims, that parallelism is not the characteristic that reaches the issue of preemption. Preemption applies if resolution of the state law claim must impact on the proper interpretation of the collective-bargaining agreement so as to put at risk the success of the policy to develop a uniform body of federal labor law principles. If a state law remedy can be resolved "independently" of the collective-bargaining agreement, §301 of the Labor Management Relations Act will not preempt.

To provide a clearer understanding of the proper test, the Supreme Court reviewed *Lingle, supra*, and ruled specifically that:

> state law is preempted by §301 of the Labor Management Relations Act of 1947 only if such application requires the interpretation of a collective-bargaining agreement.

Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 108 S.Ct. 1877, 1885 (1988). This principle, however, is not to be isolated from the holdings in *Allis-Chalmers, supra*, and *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987). In

Caterpillar, for example, the Court noted that preemption occurs when "claims [are] founded directly on rights created by collective-bargaining agreements, and also claims 'substantially' dependent on analysis of a collective-bargaining agreement." 482 U.S. at 394, quoting *Electrical Workers v. Hechler*, 481 U.S. 851, 859, n.3 (1987).

In *Lingle*, an employee brought suit against her employer in state court, alleging retaliatory discharge. The employer removed the action to federal court on the basis of diversity jurisdiction and obtained dismissal on grounds of preemption. The Court of Appeals affirmed dismissal of the complaint, concluding that the state law claim was preempted because both an arbitration and a state-law adjudication of plaintiff's claims would involve "the same analysis of the facts." Rejecting this approach the Supreme Court reversed, stating:

> [E]ven if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for §301 pre-emption purposes.

108 S.Ct. at 1883.

Lingle thus instructs for this case that in order to decide whether plaintiff's claims are preempted by §301, this must determine whether resolution of plaintiff's claims of defamation and intentional infliction of emotional

distress require an interpretation of the collective-bargaining agreement.

A similar question was addressed in an analogous context by the Fourth Circuit in *Willis v. Reynolds*, 840 F.2d 254 (4th Cir. 1988), which was decided shortly before *Lingle* was decided by the Supreme Court. A state court action which was brought by an employee against her employer alleging invasion of privacy, slander, and intentional infliction of emotional distress was removed by the employer to federal court where summary judgment was entered for the employer. In deciding on appeal that the claims were preempted by §301 the Fourth Circuit stated:

> While every assertion of a state court claim does not lead to preemption of jurisdiction, in the instant case the state tort claims being asserted purport to give meaning to the terms of the labor contract.
>
> ...[T]he alleged wrong by [the employer] in the instant case directly dealt with its right pursuant to a collective bargaining agreement to conduct investigations into possible harassment of one employee by a co-worker and the associated right to confront the suspected employee. (Emphasis added.)

Id. at 255.

This Court believes that the holding and reasoning of Willis survive *Lingle* and apply here, even though Willis was decided before *Lingle*. The language used by the Court in Allis demonstrates that the Fourth Circuit based its

decision that plaintiff's state law claims were preempted by §301 on the reason that resolution of the claims required an interpretation of the collective-bargaining agreement. This was the very test established by *Lingle*.

Under a proper preemption analysis, therefore, the first step is to recognize the essential elements of the state law tort claims, in this case defamation and intentional infliction of emotional distress, and against the elements so identified, determine whether the state law claim can be resolved without interpreting or depending on the proper interpretation of the collective-bargaining agreement.

To establish her cause of action for defamation under state law, Barbe must show that the defendants (1) published a false and defamatory statement (2) with knowledge or reckless disregard as to its falsity and defamatory character or negligently failing to ascertain whether it was false or defamatory, (3) which conduct caused damage. *Metromedia, Inc. v. Hillman*, 285 Md. 161, 172 (1979); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 596-97 (1976), Restatement (Second) Of Torts, § 580B (1977). Under certain circumstances a publication may enjoy a privilege that constitutes a defense, such as one made for the protection of the publisher's interest or a common interest. Restatement (Second) of Torts, §§ 594, 596 (1977); *see also Pratt v. Delta Airlines, Inc.*, 675 F. Supp. 991, 997 (D. Md. 1987).

Turning to the facts of this case, Barbe urges that the April 7 letter that was sent by A&P to her containing the statement that she falsified company documents constitutes the basis for the defamatory claim. The

publication of the alleged defamatory statement was made when a copy was sent to Local 27. She argues that the proof of this state law tort claim can be made independently of any interpretation of the collective-bargaining agreement between A&P and Local 27 and therefore is not preempted by federal labor law.

The employer contends that resolution of Barbe's defamation claim is "inextricably intertwined" with the interpretation of the collective-bargaining agreement and that therefore the state claim is preempted. It argues that the case is in reality a wrongful discharge claim that is governed by paragraph 4 of the collective-bargaining agreement which provides that employees may be discharged only for cause, including "dishonesty." It argues that the alleged defamatory statement was a statement of cause provided in compliance with paragraph 4 and therefore requires interpretation of the collective-bargaining agreement. The employer also argues that the publication of the statement to the union was implicitly required by the agreement and whether this notice was required is a question of federal common law. Finally, the employer argues that it was privileged to provide this statement to the union, another issue that it contends requires interpretation of the collective-bargaining agreement.

Although it is true that "dishonesty" as used in the collective-bargaining agreement is a cause for discharge, the term "dishonesty" as used there may have a special contractual meaning and need not have the same meaning or connotation that the term would have when used without reference to the collective-bargaining agreement. The letter of April 7 could be scrutinized under the state

common law standard of what is defamatory, irrespective of the definition given to the word "dishonest" as used in the collective-bargaining agreement. Thus, even if the conduct were not to constitute "dishonesty" as the term is used in the collective-bargaining agreement, it still might give rise to a cause of action for defamation. Thus, consideration of that issue might very well pursue an inquiry that is independent of any interpretation of the collective-bargaining agreement. Whether the proper interpretation of "dishonesty" can be made independently of the collective-bargaining agreement, however, need not be resolved because the issues relating to publication and privilege do require interpretation of the collective-bargaining agreement.

Counsel for Barbe conceded at the hearing on these motions that he would expect the union to be notified of employee discipline and that it was the practice for the employer to provide that notice. He also recognized that the union representative might justifiably be upset if he were not notified and that it was in the interest of the employer- union relationship that such notice be provided. He points out, however, the expressed terms of the agreement do not require notice to the union and therefore the collective- bargaining agreement would not need to be interpreted.

The employer contends that notice to the union of employee discipline that might require union intervention (as was in fact the case here) is an implicit requirement of the collective-bargaining agreement. Such notice gives rise to the first steps of the adjustment and arbitral process that is provided for in the collective-bargaining agreement.

If the employer were to notify only the employee the termination, the employer would indeed be able avoid exposure to a claim for defamation. It migh however, expose itself to some claim by the union that th employer is trying to circumvent the adjustment an arbitration process that is provided in th collective-bargaining agreement. On the other hand, if th employer complies with its understanding of th collective-bargaining agreement that notice of employe discipline must be provided to the union, it risks a suit fo defamation. Were the Court to rule that the defamato claim was independently resolvable, it would necessarily b concluding that A&P had no duty to notify the union an would necessarily be making an interpretation of th collective-bargaining agreement contrary to the positio taken by the employer. It would be making determination as to whether the preliminary steps adjustment and arbitration as described in the collectiv bargaining agreement imply a notice requirement an whether the custom of the parties involved is to be inferre as part of the collective-bargaining agreement.

Finally, if the defamation claim were not preempte the state court would be called upon to determine wheth the letter to the union was privileged, since that is defense that has been advanced by the employer. In ord to resolve the privilege defense, the state court would hav to determine the relative interests of the union, th employer and the employee in such a communication. permitting a state court to make a ruling of this type wou violate the policy of having the federal courts develop uniform body of federal labor law as it applies collective-bargaining agreements and would therefo

undermine the philosophy that gives rise to the preemption doctrine.

The Court accordingly concludes that two issues in the defamation suit, i.e. publication and the defense of privilege require interpretation of the collective- bargaining agreement, and their resolution is "dependent on analysis of a collective-bargaining agreement." *Caterpillar*, 482 U.S. at 394. The resolution of the elements of the state law claim are thus inextricably intertwined with the definition of the adjustment and arbitration process contained in the collective-bargaining agreement and with an understanding of the relative interests of the union, the employer and the employee in communicating employee discipline actions. The defamation claim is therefore preempted under §301 of the Labor Management Relations Act of 1947 and the principles of *Allis-Chalmers*, and *Willis*.

The other state common law claim asserted is based on the allegations that A&P intentionally inflicted emotional distress on Barbe by sending the April 7 letter. To establish a claim for intentional infliction of emotional distress, the plaintiff must show (1) that the conduct was intentional or reckless; (2) that it was extreme and outrageous; (3) that the wrongful conduct caused emotional distress; and (4) that the emotional distress was severe. *Harris v. Jones*, 281 Md. 560, 566 (1977).

Whether the notice of termination for "dishonesty" was reckless, extreme or outrageous will depend on whether Barbe's conduct was in violation of the agreement relied upon as the basis for the termination. If A&P complied with and satisfied the terms of the agreement, then Barbe

would be hard-pressed to urge that the conduct was outrageous. *See Douglas v. American Information Technologies Corp*, 877 F.2d 565, 571-72 (7th Cir. 1989). Similarly, state law recognizes that conduct which otherwise may give rise to this tort may be privileged if it is shown that the purported tortfeasor is insisting on his legal rights. Quoting with approval from the Restatement (Second) of Torts, the Court of Appeals of Maryland in *Young v. Hartford Accident & Indem.*, 303 Md. 182, 197 (1985), stated:

> The conduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances. The actor is never liable, for example, where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.

A&P maintains that its sending of the April 7 letter was a permissible exercise of its termination rights under the collective-bargaining agreement with Local 27. Whether it is correct in that contention would require the Court to interpret the collective-bargaining agreement to determine whether A&P had the legal rights that it claimed.

For the foregoing reasons the Court holds that Barbe's claim for intentional infliction of emotional distress is preempted by §301 of the Labor Management Relations Act.

Advancing other bases for avoiding preemption and obtaining a remand, plaintiff has cited *Linn v. Plant Guard*

Workers, 383 U.S. 53 (1966), and *Farmer v. Carpenters*, 430 U.S. 290 (1977). These cases, however dealt with different criteria for preemption pursuant to §7 and 8 of the National Labor Relations Act, as articulated in *San Diego Trades Council v. Garmon*, 359 U.S. 236 (1959), and therefore are unpersuasive in the instant case. *See Willis v. Reynolds Metals*, 840 F.2d 254 (4th Cir. 1988). *See also Lingle*, 108 S.Ct. at 1883 n.8 ("[O]ther federal labor law principles may preempt state law." (Emphasis added.))

Because plaintiff's claims of defamation and intentional infliction of emotional distress are preempted by federal labor law, they were properly removed to this Court by defendants pursuant to 28 U.S.C. 1441(a). The Court will therefore deny plaintiff's motion to remand.

III.

Defendants have moved for dismissal of the complaint or for summary judgment arguing that plaintiff has not satisfied the prerequisites of a §301 claim. Because defendants' motion makes reference to exhibits from its Petition for Removal this Court will treat the motion as one for summary judgment. See Rule 12(b), F.R. Civ. P.

Before a plaintiff may maintain a suit against his employer under §301, he must attempt to exhaust any exclusive grievance and arbitration procedures established by the collective-bargaining agreement. *See, e.g., International Union UAW*, 451 U.S. 679 (1981). Article 10 of the collective-bargaining agreement involved in this case establishes such an arbitration procedure. On April 13,

1987, plaintiff's bargaining agent, United Food and Commercial Workers Union Local 27, sent A&P a grievance notice disputing plaintiff's termination. In response, A&P sent plaintiff a letter dated April 14, 1987, informing her that the termination letter of April 7 had been rescinded and that her record would indicate that she voluntarily resigned. Neither plaintiff nor Local 27 sought further adjustment of the grievance. If plaintiff was dissatisfied with the resolution of her grievance, it was incumbent upon her to exhaust her contractual remedies by pursuing arbitration as provided in the collective-bargaining agreement.

Another prerequisite of a §301 claim is that it be brought within six months after the cause of action accrued. *See, Del Costello v. International Bhd of Teamsters*, 462 U.S. 151 (1983); *Kirby v. Allegheny Co.*, 811 F.2d 253, 256 (4th Cir. 1987). The complaint in this case was filed about one year after the actions complained of occurred, some six months after the running of the applicable statute of limitations.

Because plaintiff failed to exhaust her contractual remedies before bringing her claim and failed to file her claims within six months of the time the action complained of occurred, defendants' motion for summary judgment will be granted.

For the foregoing reasons, it is ORDERED this, 27th day of September, 1989, by the United States District Court for the District of Maryland, that:

1. The motion of the plaintiff to remand this case to the state court is denied:

2. The motion of the defendants for summary judgment is granted and judgment is hereby entered in favor of defendants and against plaintiff, with costs to abide; and

3. The Clerk is directed to mail a copy of this Opinion and Order to all parties and to close this case.

Paul V. Niemeyer
United States District Judge

FILED
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OFFICE OF THE CLERK

(2)

No. 91-863

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JANET BARBE

Petitioner,

vs.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.
and
W. E. ZENTGRAF

Respondents.

On Petition For a Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

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BRIEF OF RESPONDENTS, THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC. AND W. E. ZENTGRAF, IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Where petitioner's common law claims of defamation and intentional infliction of emotional distress allegedly arose from the respondents' transmission to the union of the notice of her termination, which transmission was required implicitly under the terms of the applicable collective bargaining agreement, should this Court review the judgment of the United States Court of Appeals for the Fourth Circuit holding that resolution of such claims requires interpretation of the collective bargaining agreement and such claims are preempted, therefore, by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185?[1]

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[1] Petitioner's Statement of the Question Presented (petition ["pet."], p. i) is incorrect in that respondents did not and do not rely on so-called "defensive" preemption of petitioner's claims but on the total preemption of such claims because of their exclusively federal nature. Petitioner's statement also mischaracterizes the claims as "garden variety" when the common law torts alleged arose only because of obligations which arguably inhere in the particular collective bargaining contract whose construction is at issue here.

PARTIES IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Great Atlantic & Pacific Tea Company, Inc.[2]

W. E. Zentgraf

Janet Barbe

[2] Respondent, The Great Atlantic & Pacific Tea Company, Inc. ("A&P"), a corporation organized under the laws of the state of Maryland, is a publicly traded company. A&P is informed that at December 13, 1991, Tengelmann Warenhandelgesellschaft, a partnership organized under the laws of the Federal Republic of Germany, was the beneficial owner of 53.2 per cent of the outstanding shares of A&P. All subsidiaries of A&P are wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
JURISDICTION	2
STATUTES INVOLVED	2
COUNTERSTATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	6
SUMMARY OF ARGUMENT	6
I. As Applied to the Fact Pattern of this Case, There is No Conflict Among the Circuits Regarding the Preemptive Effect of § 301	8
II. Because the Decisions of the Courts Below Turned on Facts Unique to this Case, the Discretionary Review Jurisdiction of this Court Should Not be Exercised	11
III. The Decisions by the Courts Below Were Clearly Correct	12
IV. A&P's Letter of Notification to the Union Is Unqualifiedly Privileged	16
CONCLUSION	17

TABLE OF AUTHORITIES

CASES:

	Page
Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)	11,13
Berenvi v. Immigration Director, 385 U.S. 630 (1967)	12
Branti v. Finkel, 445 U.S. 507 (1980)	12
Brooks v. Solomon, 542 F. Supp. 1229 (N.D. Ala. 1982)	17
Caterpillar Inc. v. Williams, 482 U.S. 386 (1987), *quoting Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987)	10
Chmiel v. Beverly Wilshire Hotel Company, 873 F.2d 1283 (9th Cir. 1989)	9
Douglas v. Information Technologies, 877 F.2d 565 (7th Cir. 1989)	9
Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983)	13
General Motors Corporation v. Mendicki, 367 F.2d 66 (10th Cir. 1966)	16
Graver Tank & Manufacturing Co. v. Linde Air Products Co., 336 U.S. 271 (1949)	12
Green v. Hughes Aircraft Co., 630 F. Supp. 423 (S.D. Cal. 1985)	16
Harris v. Jones, 281 Md. 560 (1977)	15
Hasten v. Phillips Petroleum Co., 640 F.2d 274 (10th Cir. 1981)	16
Hyles v. Mensing, 849 F.2d 1213 (9th Cir. 1988)	9
Jackson v. Southern California Co., 881 F.2d 638 (9th Cir. 1989)	9
Jacron Sales Co. v. Sindorf, 276 Md. 580 (1976)	14
Keehr v. Consolidated Freightways of Delaware, Inc., 825 F.2d 133 (7th Cir. 1987)	8

Table of Authorities Continued

	Page
Knafel v. Pepsi-Cola Bottlers of Akron, Inc., 850 F.2d 1155 (6th Cir. 1988)	9
Krashna v. Oliver Realty Inc., 895 F.2d 111 (3rd Cir. 1990)	8
Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988)	8,11,13
Magnum Import Company, Inc. v. Coty, 262 U.S. 159, 163 (1923)	11
McCormick v. AT&T, 934 F.2d 531 (4th Cir., May 28, 1991)	6
Metromedia Inc. v. Hillman, 285 Md. 161 (1979)	14
Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58 (1987)	13
NCAA v. Board of Regents, 468 U.S. 85 (1984)	12
O'Shea v. The Detroit News, 887 F.2d 683 (6th Cir. 1989)	8
Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41 (1987)	13
Pratt v. Delta Airlines, Inc., 675 F. Supp. 991 (D. Md.1987)	15
Rogers v. Lodge, 458 U.S. 613 (1982)	12
Shane v. Greyhound Lines, Inc., 868 F.2d 1057 (9th Cir. 1989)	7,9
Smolarek v. Chrysler Corp., 879 F.2d 1326 (6th Cir. 1989)	9
Tillez v. Pacific Gas & Electric Co., 817 F.2d 536 (9th Cir. 1987)	9
United States v. Doe, 465 U.S. 605 (1984)	12
United States v. Johnston, 268 U.S. 220 (1925)	12
STATUTES:	
§ 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 10(b)	5

Table of Authorities Continued

	Page
§ 301 of the Labor Management Relations Act, 29 U.S.C. § 185	2
National Labor Relations Act, 29 U.S.C. § 141 *et seq*	*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-863

JANET BARBE

Petitioner,

VS.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.
and
W. E. ZENTGRAF

Respondents.

On Petition For a Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

---

BRIEF OF RESPONDENTS, THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC. AND W. E. ZENTGRAF, IN OPPOSITION TO CERTIORARI

OPINION BELOW

The unreported opinion[3] of the United States Court of Appeals For The Fourth Circuit is reprinted in Appendix A to the petition at 1a-10a, cited herein as "___ a". The opinion of the United States District

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[3] Under the Internal Operating Procedures of the Fourth Circuit, I.O.P. Nos. 36.5 and 36.6, "[u]npublished opinions are not binding precedent in [the Fourth] circuit."

Court for the District of Maryland, which was affirmed by the United States Circuit Court of Appeals for the Fourth Circuit, is reported at 722 F. Supp. 1257 (D. Md. 1989), reprinted in Appendix B to the petition at 1b-17b, cited herein as "___ b".

The applicable collective bargaining agreement was part of the record in the courts below (Joint Appendix, pp. 21-45). Relevant excerpts from that agreement are reprinted in Appendix A to this Opposition, cited hereafter as "Resp. Opp. ___ a".

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition at p. 2.

STATUTES INVOLVED

The statute principally involved is § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("§ 301"), and is set forth in the petition at pp. 2-3. The statute under which the case was removed to federal court is set forth in the petition at p.3.

COUNTERSTATEMENT OF THE CASE

Petitioner Janet Barbe ("petitioner") seeks review of the unpublished *per curiam* Opinion and Order of the United States Court of Appeals for the Fourth Circuit entered on July 26, 1991. That Order dismissed as preempted by § 301 the claims of defamation and intentional infliction of emotional distress made by petitioner under the common law of the state of Maryland against respondents, The Great Atlantic & Pacific Tea Company, Inc. ("A&P") and W.E. Zentgraf, hereinafter sometimes jointly referred to as "respondents". 2a, 10a.

Petitioner was employed by A&P as a bakery clerk in 1984. 2a, 2b. She was represented for collective bargaining purposes by Local 27 of the United Food & Commercial Workers Union ("union" or "Local 27"), which had a collective bargaining contract ("contract" or "agreement") with A&P in effect from September 14, 1986 through September 16, 1989. The contract recognized the union as the exclusive representative of its bargaining unit employees, including petitioner. *Id.* Believing that petitioner had falsified a worker's compensation claim, A&P, through its personnel director Zentgraf, sent a letter to petitioner dated April 7, 1987, notifying her that ". . . effective March 31, 1987, you are terminated for falsification of [a] company document." *Id.* Copies of the letter were forwarded to petitioner's two supervisors and to the union. *Id.*

A&P sent the notice letter to the union pursuant to various provisions in the contract which it believed required such notice, although the contract contains no explicit provision obliging such notice.[4] The notice

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[4] For example, section 5 of article 4 of the agreement stated:

> The Employer agrees to advise the Union of . . .all terminations. . . on a monthly basis." Resp. Opp., ___ a.

Section 8 of article 4 of the contract gave A&P ". . .the right to discharge . . . any employee for good cause, including . . . dishonesty", while Article 10 established a mandatory grievance and arbitration procedure for resolution of disputes ". . . concerning the interpretation of the provisions of th[e] Agreement." Resp. Opp., ___ a.

Section 2 of article 10 of the agreement provided:

> "Upon receipt of notice [of a controversy, dispute or disagreement as defined in section 1] from either party, the representative of the Employer and the

letter was a statement of cause transmitted to the union to make effective the mandatory and exclusive grievance and arbitration procedures set forth in article 10 of the contract. 4a; 10b; 11b. After the union invoked the contract's grievance procedure, A&P immediately rescinded the termination letter and gave petitioner two (2) successive six (6) month leaves of absence. 3a; 3b. Petitioner sought no further relief under the contract. *Id.*

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representative of the Union shall, within three (3) days, commence discussion in an attempt to reach a settlement of the controversy." Resp. Opp., ___ a.

Section 5 of article 10 of the agreement stated:

> "All complaints must be filed, in writing, within thirty (30) days after occurrence of the matter in dispute [or] disagreement, provided that any complaints in reference to dismissal must be filed, in writing, to the Employer within ten (10) days from the date of dismissal. Complaints not filed within the limits herein specified shall have no right of appeal by any party involved."

Section 7 of article 10 of the agreement stated:

> "Since it is the desire of the parties to expedite the handling of all grievances, they therefore agree that the time limits prescribed must be followed, unless agreed to by the Union and the Employer. The party failing to move forward as required shall be deemed to have withdrawn the grievance. All notices required herein shall be in writing." Resp. Opp., ___ a.

Finally, in the general preamble to the contract, "The Employer and the Union each represent that the purpose and intent of this Agreement is to . . .provide a channel through which information and problems may be transmitted from one to the other." Resp. Opp., ___ a.

Petitioner filed suit in the Circuit Court of Maryland for Baltimore County, charging under the common law of the State of Maryland that the sending of the termination notice letter to the union was defamatory and intentionally inflicted emotional distress upon her. 3a; 2b.[5] Respondents removed the case to the United States District Court for the District of Maryland and asked for dismissal on the ground of total federal preemption by § 301. Petitioner opposed and asked that the case be remanded to state court. 3a; 3b, 4b.

After setting forth each of the elements of the claims under Maryland law, the district court found that resolution of at least two (2) necessary elements of the tort of defamation, *i.e.*, publication and privilege, would draw the court into interpreting important rights and obligations of notice to the union pursuant to the labor contract. 13b. The court also held that disposition of the claim of intentional infliction of emotional distress required the determination whether A&P, in sending the notice letter to the union, was engaging in a permissible exercise of its rights and duties under the labor contract. 14b. For these reasons, the court found these claims preempted by § 301. Under § 301, petitioner had to exhaust the exclusive grievance and arbitration procedures of the collective bargaining agreement and to file her claims within the applicable six month limitation period established by § 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 10(b). Since petitioner

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[5] Petitioner conceded that the letter was properly sent to her two (2) supervisors and that such communication was privileged. 2b

failed to do so, the district court granted summary judgment to respondents. 15b-16b.

Petitioner appealed to the United States Circuit Court of Appeals for the Fourth Circuit. 2a. Based upon the analysis for determining § 301 preemption set forth in *McCormick v. AT&T*, 934 F.2d 531 (4th Cir., May 28, 1991) (*en banc*), the court affirmed the dismissal. 5a. As to the defamation claim, the court found that whether the sending of the termination notice to the union constituted publication, or was privileged, depended on whether the contract "... authorized, or perhaps even anticipated, such a notice." 4a. Similarly, to resolve the claim of intentional infliction of emotional distress, the court would have to decide whether A&P's transmission of the notice was in compliance with the contract. 4a. For these reasons, the claims were preempted by § 301, and dismissed as untimely. 3a.

REASONS FOR DENYING THE WRIT

Summary of Argument

Petitioner has raised no issues of sufficient importance to justify review of the decisions below under Rule 10 of the Rules of this Court or other authority. Her challenge instead is directed to the application by the courts below of well-established precedent to the particular facts of the case at hand, a palpably insufficient basis to invoke the discretionary jurisdiction of this Court. On the facts of this case, there is no conflict among the circuits as to either the legal standards applicable under § 301 to petitioner's claims or to their proper resolution, nor is there any broad federal question which this Court should address. The differing results among the circuits in several cases

presenting generically similar tort claims have turned on the individualized fact patterns presented in each case and on the elements of the torts under state law, not on the considerations erroneously identified by petitioner. Those cases are not even remotely comparable to the case at bar. In this regard, in a case whose fact pattern mirrors that in this case, the United States Circuit Court of Appeals for the Ninth Circuit, like the Fourth Circuit in this case, found total preemption by § 301. *See, e.g., Shane v. Greyhound Lines, Inc.*, 868 F.2d 1057 (9th Cir. 1989).

The decisions by the courts below were quite clearly correct in that they considered carefully and applied faithfully the teachings which have emerged from this Court in recent precedent construing the scope and reach of § 301 preemption. The decision of the Fourth Circuit, moreover, was in the form of an unpublished[6] *per curiam* decision which, for that reason, is of distinctly limited precedental effect. Finally, the communication at issue was absolutely privileged under federal law.

For all these reasons, the dismissal of petitioner's common law claims should not be reviewed by this Court.

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[6] I.O.P. 36.6 of the Internal Operating Procedures of the United States Court of Appeals for the Fourth Circuit provides:

> "In the absence of unusual circumstances, this court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this court's unpublished disposition in briefs and oral arguments in this court and in the district courts within this circuit is disfavored. . ."

I. As Applied to the Fact Pattern of this Case, There is No Conflict Among the Circuits Regarding the Preemptive Effect of § 301

Given the unique set of facts presented here, none of the circuit court precedent relied upon by petitioner supports her claim for review. Rather, these cases simply attest to the efforts of these several courts to apply to the particular facts in the cases before them the legal standards developed by this Court in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), and other cases decided by this Court construing § 301. Since such decisions always turn on consistent legal standards applied to widely disparate fact situations, it is unsurprising that different facts have led to different outcomes. In no manner does that suggest, as petitioner argues, that any of these circuits, if presented with the facts of this case, would decide this case differently from the courts below.

Each of the cases in the survey of the law of the circuits conducted by petitioner (pet., pp. 10-20) is easily distinguishable on its facts from this case.[7] That

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[7] Krashna v. Oliver Realty Inc., 895 F.2d 111 (3rd Cir. 1990) involved a claim of intentional infliction of emotional distress by a garage attendant represented by a union who claimed he was wrongfully discharged after filing a workers compensation claim. Although the court held the claim not to be preempted by § 301, there was no suggestion, as there is in this case, that the employer's conduct was mandated by the labor contract.

In O'Shea v. The Detroit News, 887,F.2d 683 (6th Cir. 1989), the claim of intentional infliction of emotional distress was based on the employer's transfer of a unionized older employee to the night shift pursuant to discretion given it under the labor contract. The transfer was not made pursuant to any contractual requirement.

Keehr v. Consolidated Freightways of Delaware, Inc., 825

survey also shows that no hard and fast inter- or intra-circuit rules can be said to apply to the dispositions in each case. For example, separate panels in each of the sixth, seventh and ninth circuits[8] have found both for and against preemption by § 301 of claims of defamation and/or intentional infliction of emotional distress, with the variance in results due in each instance to the different facts in each case.

The case most analogous to this case is one not cited by petitioner, *Shane v. Greyhound Lines, Inc.*, 868 F.2d 1057 (9th Cir. 1989). There, discharged employees brought claims under state law, *inter alia*,

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F.2d 133 (7th Cir. 1987) presented claims of defamation and intentional infliction of emotional distress which arose from abusive remarks to a union member by a supervisor, conduct ". . .not even arguably sanctioned by the labor contract." Id., at 138. To the same effect is Tillez v. Pacific Gas & Electric Co., 817 F.2d 536, 539 (9th Cir. 1987). And, see also, Jackson v. Southern California Co., 8817 F.2d 638 (9th Cir. 1989) where the intentional infliction of emotional distress claim was held to be preempted but the defamation claim was not because the circularization of an alleged defamatory letter to twelve (12) employees was not required by the labor contract. Here, in direct contrast, respondents contend that the conduct complained of, *i.e.*, notice to the union, was necessary because of the agreement.

[8] Compare Smolarek v. Chrysler Corp., 879 F.2d 1326 (6th Cir. 1989) (no preemption by § 301) with Knafel v. Pepsi-Cola Bottlers of Akron, Inc., 850 F.2d 1155 (6th Cir. 1988) (preemption by §301). Compare also, Keehr v. Consolidated Freightways of Delaware, Inc. (no preemption) supra, with Douglas v. Information Technologies, 877 F.2d 565, 572 (7th Cir. 1989) (preemption); compare also Jackson v. Southern California Gas Co., supra, (no preemption) with Tillez v. Pacific Gas & Electric Co., supra, Chmiel v. Beverly Wilshire Hotel Company, 873 F.2d 1283 (9th Cir. 1989) (preemption) and Hyles v. Mensing, 849 F.2d 1213 (9th Cir. 1988) (preemption).

for defamation and intentional infliction of emotional distress based on discharge notices which cited the destruction of company property and harassment of other workers as the reason. The claims were held preempted by § 301 both because the notices were required by the labor contract and because the claims amounted to complaints about the administration of discipline under the labor contract. In other words, on comparable facts, the ninth circuit (which has ruled both for and against preemption by § 301 of state law tort claims, see f.n. 9, 10, *supra*), like the courts below, found preemption by § 301.

The conflict among the circuits sought to be manufactured by petitioner is, therefore, a fiction because petitioner cites no truly apposite authority. Petitioner is also flatly wrong in arguing that "...the courts cannot decide whether preemption under § 301 should be based on the plaintiff's reliance on the collective bargaining agreement for its state law claim, or the defendant's reliance on the collective bargaining agreement for its defense." (pet., p. 8). To our knowledge, no circuit court—certainly not the courts below—has relied on such a simplistic and manifestly incorrect formulation. Instead, in line with the teachings of this Court, these courts have simply recognized that the preemptive effect of § 301 can be "...so 'extraordinary' that it 'converts an ordinary state common law complaint into one stating a federal claim for purpose of the well-pleaded complaint rule.'" *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987), *quoting Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987). Preemption by § 301 has such a "converting effect"—and becomes complete preemption as opposed to defensive preemption - when resolution of

the claim requires interpretation of the labor contract. It is this latter inquiry to which the various circuit courts have directed their attention and which has produced different outcomes under § 301. It is also the reason why the courts below found total preemption of petitioner's claims in this case. 4a, 5a; 13b, 14b.

II. Because the Decisions of the Courts Below Turned on Facts Unique to this Case, the Discretionary Review Jurisdiction of this Court Should Not be Exercised

This case, far from being "garden variety" (pet., p. i) in nature, springs directly from obligations of notice rooted in the contract. Petitioner's claims of common law torts in this case depend entirely on whether the labor contract did, or did not, require notice to the union of the petitioner's termination and the reasons therefor. That mixed question of fact and law is the central issue upon which resolution of each of petitioner's common law tort claims depend. It is perforce a federal question because, to answer it, the courts below had to assess the record facts and interpret the contract. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Lingle v. Norge Div. of Magic Chef, Inc., supra.*

Petitioner does not and cannot quarrel with the well-established legal principles identified by the courts below which guided their application of § 301 but simply challenges their application to the particular facts in this case. It is not the function of certiorari, however, to give a disappointed litigant another chance at appellate review. *Magnum Import Company, Inc. v. Coty*; 262 U.S. 159, 163 (1923). Nor is it the practice of this Court to grant review to

review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925). Inasmuch as the decisions of the courts below turned upon their determination that the labor contract had to be interpreted in light of its various provisions (*see*, f.n. 4, *supra*) to decide whether singly or together they required notice to the union, this case is not an appropriate vehicle for review by this Court.[9]

III. The Decisions by the Courts Below Were Clearly Correct

In this case, acting pursuant to custom and practice and its own understanding of its obligations under the contract, A&P advised the union of petitioner's termination and the reasons therefor. A&P did so to comply with various parts of the contract which arguably require such notice so that the union could fulfill its representational function. 3a; 4a; 2b; 10b; f.n. 4. Indeed, A&P's failure to do so might well have given rise to liability for circumventing the bargaining representative of the employees in violation of the National Labor Relations Act, 29 U.S.C. § 141 *et seq.*, or may have resulted in an untimely grievance, to the detriment of petitioner's interests. 12b. Petitioner

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[9] Indeed, "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949); Berenvi v. Immigration Director, 385 U.S. 630, 635 (1967); Branti v. Finkel, 445 U.S. 507, 512 n.6 (1980); Rogers v. Lodge, 458 U.S. 613, 623 (1982); United States v. Doe, 465 U.S. 605 (1984); NCAA v. Board of Regents, 468 U.S. 85, 98 n.15 (1984).

charged nonetheless that the very act of notice to the union subjected A&P to common law tort liability.

§ 301 grants to federal courts jurisdiction over "[s]uits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce. . . .".[10] § 301 preempts all state law claims for violation of rights under a collective bargaining agreement, and extends to tort suits brought under state law when ". . . resolution of a state law claim is substantially dependent uponanalysis of the terms of an agreement made between the parties in a labor contract." *Allis-Chalmers Corp. v. Lueck*, *supra* at 211 (1985); *see also*, *Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983).

In disposing of petitioner's claim, the courts below applied the fundamental principle announced by this Court that ". . .state law is preempted by § 301 only if such application requires the interpretation of a collective bargaining agreement. *Lingle v. Norge Div. of Magic Chef, Inc.*, *supra* at ___ .4a; 7b, 8b. In applying *Lingle*, the courts below correctly recognized that there is simply no way to resolve such claims except by reaching into the labor contract to deter-

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[10] This Court has held expressly that "[t]he preemptive force of § 301 is so powerful as to displace entirely any state cause of action" within its scope. Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 23 (1983). A tort action brought nominally under state law is, when preempted by § 301, "federalized"—i.e., "any civil complaint raising this select group of claims is necessarily federal in character," Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58, 63 (1987), and "[a]ny such suit is purely a creature of federal law." Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 56 (1987).

mine the nature and extent of A&P's obligation to notify the union concerning the discharge of an employee whom it represents, and what, if any, privilege attaches to such a communication. 4a; 12b.

This is evident from the analyses of the courts below which, as a first step, identified each of the constituent elements of the state tort claims. In Maryland, for example, defamation consists of proof of (1) publication of a false and defamatory communication (2) with knowledge of or reckless disregard of its defamatory character (3) which caused damage. *Metromedia Inc. v. Hillman*, 285 Md. 161, 172 (1979); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 596-97 (1976); 4a, 9b. Given the nature of petitioner's claim, the court would have to decide whether notice to the union constituted publication under Maryland law, *i.e.*, whether the agreement ". . .authorized, or perhaps even anticipated, the sending of such a notice." 4a. As the district court noted:

> "Were the Court to rule that the defamation claim was independently resolvable, it would necessarily be concluding A&P had no duty to notify the union and would necessarily be making an interpretation of the collective bargaining agreement contrary to the position taken by the employer. It would be making a determination as to whether the preliminary steps of adjustment and arbitration as described in the collective bargaining agreement imply a notice requirement and whether the custom of the parties is to be inferred as part of the collective bargaining agreement." 12b.

On the other hand, if the court determined that notice to the union was necessary under the agreement, that decision would, in effect, negate petitioner's claim that there was a publication under state law. In either event, the question cannot be decided outside the express provisions and implied contours of the agreement.[11]

Related to these considerations, A&P claimed the communication to the union was privileged. *See*, e.g. *Pratt v. Delta Airlines, Inc.*, 675 F. Supp. 991, 997 (D. Md.1987); 4a, 9b. To rule on this privilege question, the courts below held, an assessment of the relative interests of A&P, Local 27 and petitioner with respect to notification of termination of a bargaining unit employee would have to be made in light both of the rights and obligations of the parties under the labor contract, and of the strong policy favoring federal uniformity. 4a; 12b; 13b; *see Allis-Chalmers*, *supra* at 211. .

The constituent elements in Maryland of the tort of intentional infliction of emotional distress are (1) intentional or reckless conduct (2) that is extreme or outrageous (3) and which caused severe emotional distress. *Harris v. Jones*, 281 Md. 560, 566 (1977); 4a; 13b. As found by the courts below, the question whether A&P's conduct was "reckless", extreme", or "outrageous" requires an assessment of whether A&P, in sending the termination notice, was simply

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[11] In this connection, the court must consider implied contract rights and implied obligations of notice which may be involved for "[t]he assumption that the labor contract creates no implied rights is not one that state law may make." Allis-Chalmers v. Lueck, supra at 215 (1985).

exercising its termination rights in a permissible way under the contract. *Id.* As the district court noted, "[i]f A&P complied with and satisfied the terms of the agreement, then [petitioner] would be hard pressed to urge that the conduct was outrageous." 13b-14b.

The courts below thus faithfully adhered to the principles announced by this Court in *Lingle* and its progeny, and reached the same result as reached by other circuit courts on comparable facts. *See, e.g., Shane v. Greyhound Lines, Inc., supra,* and *Hyles v. Mensing, supra.* For that additional reason, there is no basis for review of petitioner's claims.

IV. A&P's Letter of Notification to the Union Is Unqualifiedly Privileged

Statements made in the effort to obtain a peaceable disposition of a grievance have been held to be privileged unqualifiedly under federal common law. *General Motors Corporation v. Mendicki,* 367 F.2d 66, 70 (10th Cir. 1966). This privilege has been applied to the discharge letter required by the collective bargaining agreement as well. *Hasten v. Phillips-Petroleum Co.,* 640 F.2d 274, 279 (10th Cir. 1981); *Hyles v. Mensing, supra.*

Federal courts have recognized an unqualified privilege for statements made during the entire proceeding contemplated by the labor contract for the grievance machinery, including the employer's notification to the union of its actions. *Green v. Hughes Aircraft Co.,* 630 F.Supp. 423, 427-28 (S.D. Cal. 1985) (statements to union privileged and nonactionable as defamatory torts). There is an overriding federal labor policy to encourage, facilitate and effectuate the settlement of issues between employers and employees

which supports this absolute privilege. *Brooks v. Solomon*, 542 F.Supp. 1229, 1253 (N.D. Ala. 1982).

For the independent reason that the communication at issue is privileged under federal common law, the decisions below should not be reviewed by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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